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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1941

NO. 932

EDMOND L. VILES and
FRANCES N. VILES,
*Petitioners,*
vs.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari to
the Circuit Court of Appeals for the Tenth Circuit.

## BRIEF OF RESPONDENT

HORACE PHELPS,
For Respondent.

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

Petitioners are here seeking certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit in

Viles, et al., v. Prudential Insurance Company of America, 124 Fed. (2d) 78.

The case presents in a changed form of action the same controversy which was adjudicated in

Viles, et al., v. Prudential Insurance Company of America, 107 Fed. (2d) 696.

Certiorari denied 308 U. S. 626.

See also Viles v. Prudential Insurance Company of America, 96 Fed. (2d) 3.

Following this court's denial of leave to file a second petition for rehearing in No. 621, October Term, 1939, 311 U. S. 723, a new suit (the present one) was brought in the state Court, removed to the United States District Court for the District of Colorado, decided adversely to plaintiffs in the last named Court and appealed to the Circuit Court of Appeals for the Tenth Circuit, where the judgment of the District Court was affirmed. Rehearing was denied, and the present petition followed.

No copy of the record filed in this Court has been furnished, so that specific reference to the pages or folios thereof cannot be made.

The present suit is bottomed upon the same disability provisions of the same policy of insurance involved in the former suit. That was a policy issued by respondent, The Prudential Insurance Company, upon the life of petitioner Edmond L. Viles, dated June 10, 1927, for $10,000.00, containing provision for disability benefits in case of total and permanent disability and naming petitioner Frances N. Viles as beneficiary, with right reserved to the insured to change the beneficiary. This policy lapsed on January 10, 1929, for non-payment of the semi-annual premium due December 10, 1928. The present suit was brought January 7, 1941, about twelve years after the lapse of the policy.

The pertinent policy provisions appear in a footnote in 96 Fed. (2d) at Page 4. The issues of fact and a review of the evidence in the trial of the first case appear in the opinion of the trial Court (not reported but appearing at Pages 206-221 of the record lodged in this Court in No. 621, October term, 1939).

The first suit was a suit in equity. The relief sought was

> "(a) That defendant be compelled to reinstate said Policy as of December 10, 1928.
>
> "(b) That premium due December 10, 1928, and all subsequent premiums be waived by defendant.
>
> "(c) That defendant pay plaintiff $100.00 per month since October, 1928, with the legal rate of interest added on all delinquent payments, and that said payments of $100.00 per month be continued as long as plaintiff is totally and permanently disabled."
>
> (d) For damages, costs and other proper relief.

A complete history of the first case, with pleadings, findings of fact, conclusions of law, decree, etc., attached as exhibits, is set forth in the second defense of defendant's answer in the present case as a plea of res judicata.

The second suit (the present one) is in form an action at law. Plaintiff, joining his wife, the beneficiary named in the policy, as a party plaintiff, seeks damages in a large sum for alleged repudiation of the contract of insurance. The facts alleged in the complaint are the same as those alleged in the amended complaint in the first action.

On motion of defendant, the trial court "dropped" Mrs. Viles as a party plaintiff, and upon inquiry into the merits of the case as required by U.S.C.A., Title 28, Section 835, found that the case was without merit, that the controversy had been fully adjudicated in the former case, and

dismissed the action. As already stated, the Circuit Court of Appeals affirmed.

## BRIEF OF THE ARGUMENT

The following points are submitted in opposition to the present application:

### I.

There is an absence of any recognized ground for the granting of the Writ of Certiorari.

### II.

The case involves no question of importance to the public or to anyone except the parties. The granting of the writ would have no result other than to give the defeated party another hearing. This Court does not exercise its power nor make use of its jurisdiction to that end.

### III.

The controversy which the present suit seeks to renew was decided upon the merits by the United States District Court for the District of Colorado, and the judgment of that Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in

> Viles v. Prudential Insurance Company of America, 107 Fed. (2d) 696.
>
> Certiorari denied 308 U. S. 626.
>
> Rehearing denied 309 U. S. 695.

In that suit all issues of fact tendered by the complaint in the present action were decided adversely to the plaintiff. The primary relief therein sought was reinstatement of the same policy of insurance upon which the present suit is based. Had the facts set forth in the amended complaint in that suit been proven, equitable relief would have

been justified. There was no "mistake of remedy." Plaintiff in that case elected to proceed in equity. Equity had jurisdiction. That forum was a proper one. No demand for jury trial was made; no such demand or request was refused. Moreover, there was no right of trial by jury. In the present suit, damages are sought for alleged repudiation of the policy. The facts alleged are identical with those alleged in the former suit. The only change is in the nature of the relief demanded.

IV.

Primarily the present application is based upon two contentions, neither of which can be sustained.

The first of these contentions is that in the former case trial by jury was denied. The record in that case lodged in this Court, No. 621, October Term, 1939, will be searched in vain for any suggestion that trial by jury was requested or denied.

The second contention is that it appeared in the former suit that plaintiff there had an adequate remedy at law; hence, that there was no jurisdiction in equity and that the decree rendered is void and constitutes no bar to a suit at law. The unanswerable answer to this is that equity did have jurisdiction, that the remedy sought was a proper one, and that the adverse decree rendered upon the merits forever barred another suit upon the same facts in any forum and in any form of action. In addition to the cases cited in the opinion of the Circuit Court of Appeals for the Tenth Circuit holding that a suit in equity "to declare the policy still in being" is a proper remedy, see

Burnet v. Wells, 289 U. S. 670-680; and
Aetna Life Insurance Co. vs. Haworth,
300 U. S. 227.

V.

The trial Court properly "dropped" the beneficiary as a

party plaintiff. She has and had no interest and was improperly joined as a party plaintiff.

The right of action for damages for wrongful repudiation of a policy of life insurance belongs to the insured and not to the beneficiary. The latter is without interest. In case of the death of the insured, that right of action passes not to the beneficiary named in the policy but to the personal representative of the insured.

DeFord vs. New York Life Insurance Co., 75 Colo. 146, 147, 148.

See also: Stray vs. Western States Life Co., 75 A.L.R. 950;

s. c. 300 Pac. Rep. 1046 (Wash.);

Mutual Relief Ass'n vs. Ray, 173 Ark. 9;

s. c. 292 S.W. Rep. 396-401;

Slocum vs. Northwestern National Life Ins. Co., 135 Wis. 288;

s. c. 115 N.W. Rep. 796;

Knights Templar, etc. vs. Gravett, 49 Ill. App. 252.

VI.

The plea of res judicata interposed by the defendant in the present case by the second defense of its answer, was good and shows that in the former case there was a final and conclusive adjudication of every matter and issue sought to be raised in the present action. Change in the form of action and the introduction of an additional plaintiff who has no interest do not give the right to another trial of matters already fully litigated and decided.

VII.

To grant certiorari upon the present application would create an undesirable precedent and one likely to put an

intolerable burden upon this Court. Disappointed litigants whose cases involve no question of public interest or concern, no Federal question, no "conflict of circuits," no question of local law which has been decided contrary to the applicable local decisions, indeed no recognized ground for the granting of certiorari, have no standing here and no claim upon the time of this Court.

## CONCLUSION

It is hoped that this incomplete and informal memorandum may serve to lighten the labors of the Court, at least by making clear the nature of the case and of the questions involved and decided. It is submitted that the record shows the case to involve nothing more than a belated second attempt through litigation to restore vitality to a lapsed policy of life insurance. The attempt has not succeeded; the facts preclude success.

Respectfully submitted,

HORACE PHELPS,

For Respondent.

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## PETITION FOR REHEARRING

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EDMOND L. VILES, Pro se
FRANCES N. VILES, Pro se
Petitioners
GOLDEN, COLORADO

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# PETITION FOR REHEARRING

---

This honorable Court has inadvertently overlooked or has misapprehended the conflicts in the instant opinion with the opinions of other Circuit Courts of Appeal, and the opinions of this Court involving fundamental law and the public interest.

The heart of the controversy briefly stated is: That insured has been unlawfully denied his constitutional right of a trial by jury on Issues of Fact, on the ground that Findings of Fact and Decree entered by a Chancellor in a former action between the same parties is a bar to this action.

PETITIONERS CONTEND THAT THE SAID FINDINGS OF FACT AND DECREE ARE VOID ON THEIR FACE, BECAUSE THERE WERE NO EQUITY JURISDICTIONAL AVERMENTS IN THE FORMER COMPLAINT AND THAT EQUITY JURISDICTION CANNOT BE CONFERRED BY CONSENT OR WAIVER, AND THERE IS NO WRITTEN WAIVER OF A JURY IN THE RECORD.

AND A COURT SITTING WITHOUT A JURY WHERE THERE IS A RIGHT TO A JURY TRIAL WHICH HAS NOT BEEN WAIVED, HAS NO JURISDICTION OF THE CASE AND THE DECREE IS VOID, THE JURY BEING A NECESSARY CONSTITUENT PART OF THE COURT ITSELF.

AND FOR GREATER PARTICULARITY PETITIONERS ALLEGE:

## CONFLICT NO. 1

The opinion in the instant case holds: That when an insurer wrongfully repudiates or breaches its contract to pay disability benefits periodically, the insured may institute a proceeding in equity demanding judgment for money due on contract, and for a specific performance and for protracted supervision over a period of years, and if insured fails in such action, he cannot thereafter pursue his alternative remedy at law.

This holding is in direct conflict with the following opinions of both State and Federal Courts which hold:

Where an insurer wrongfully repuliates or breaches its contract to pay disability benefits periodically the insured has but two remedies, both legal:

1. That the insured may sue for all installments in default, or

2. Insurer may consider the policy at an end and sue insurer for all damages resulting from the said breach, including all future installments based on life expectancy, under the doctrine of "Anticipatory Breach."

Opinions holding to the first remedy,
Kimel v. Mo. State L. Ins. Co., 71 F (2) 921 Tenth Circuit.
Kilheart v. Metropolitan L. Ins. Co., D.C., 1 F supp. 719
Hines v. Fidelity Mut. L. Ins. Co., D.C., 6 F. supp. 692
Menssen v. Travelers Ins. Co., D.C., 5 F supp. 114
Jordan v. Equitable L. Ass. Soc., S.C., 169 S.E., 673
Odeorne v. Equitable L. Ass. Soc., S.C., 169 S.E., 673
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Buis v. Prudential Ins. Co., 77 S.W. (2) 127
81 A. L. R. 381, 99 A. L. R. 1172

Opinions holding to the second remedy:
National Mut. L. Ins. Co., v. Hicks, Tex., 65 S.W. (2) 805
Robins v. Travelers L. Ins. Co., N.Y., 269 N.Y.S. 841
Metropolitan L. Ins. Co. v. Schneider, Ind., 193 N.E. 690
Prudential Ins. Co. v. Sweet, Ky., 69 S.W. (2) 748
Home L. Ins. Co. v. Ward, Ark., 75 S.W. (2) 379
Sanders v. Universal L. Ins. Co., Tex. 74 S.W. (2) 301
Aetna L. Ins. Co. v. Davis, Ark., 60 S.W. (2) 912

The following opinions hold that specific performance of a contract calling for successive acts or protracted supervision over a period of years, is not cognizable in Equity:

Engemeon v. Rea, et al, 26 F. (2) 576, C. D. Tenth Circuit

Arizona Edison Co. v. Southern Sierras P. Co., 17 F. (2) 739, C.D.

United Fuel Gas Co. v. Smith Oil Corp., 41 F. (2) 4

Daniels v. Brown Shoe Co., 77 F. (2) 899

York Haven P. & W. Co. v. York Haven P. Co., 205 F. 270

United Cigarette Machine Co. v. Winters C. Mack Co. 194 F. 947

Javarierre v. Central Allegracia 217 U.S. 502

Texas & Pac. R. R. Co. v. City of Marshall, 136 U. S. 405

The following opinions hold that equity will not decree specific performance of a contract where it is not a **mutual** remedy,

Engemeon v. Rea et al, supra, (Opinion by Judge Phillips)

Strong v. Richmond P. and C. R. Co., 101 F. 511, Fourth Circuit

General Electric Co. v. Westinghouse Electric & Mfg. Co., 144 F. 458

Elec. Mo. Corp. v. United P. & L. Corp., 19 F (2) 311, Eighth Circuit

Shubert v. Woodward, 167, F. 55

Marble Co. v. Ripley, 10 Wall 339

Pantages v. Grauman, 191 F. 317, Ninth Circuit

Tausig v. Corbin, 142 F. 660, Third Circuit
32 C. J. 296, p. 194
36 Cyc. 581

CONFLICT NO. 2

The opinion in the instant case holds: That where there is a diversity of citizenship, and the amount in controversy exceeds $3,000, less interest and costs a Federal Court has jurisdiction of the subject matter and the parties, and if the Court makes a mistake and tries an Action at Law as a Suit in Equity, without a jury, where there are no Equity Jurisdictional Averments in the Pleadings, and there is no waiver of a jury, Equity Jurisdiction is considered conferred by consent or waiver if not objected to by defendant **in Limine.**

The above quotation from the instant opinion is in direct conflict with the following opinions which hold that where there are no Equity Jurisdictional Averments in the Complaint, Equity Jurisdiction cannot be conferred by consent or waiver, and Findings of Fact and Decree by a Chancellor are void, and that a court sitting without a jury where there is a right to a jury trial which has not been waived, has no jurisdiction of the case and the decree is void, the jury being a necessary constituent part of the court itself:

Conn v. Rowe, 153, N.E. 537, Mass., 48 A.L.R. 762

State v. Bates, 61 P. 905, Utah

Smith v. Bourbon Co., 127 U. S. 105, 32 L. ed. 73, 8 S. Ct. 1043

Mageev v. Magee, 99 Am. Dec. 571, Ill.

Green v. Creighton, 48 Am. Dec. 742

Bottemiller v. Ball, 279 P. 52, 69 A.L.R. 951
31 Am. Jur. p. 562, sec. 11
19 Am. Jur. p. 122, sec. 121
19 Am. Jur. p. 55, sec. 26, Note 1

Touey v. New York L. Inc. Co., 102 F. (2) 16 C.D.

In Aufdenkamp v. L'Herrison, 56 F. (2) 344, the Circuit Court of Appeals held: Equity has no jurisdiction where main cause of action is legal if complainant has full and adequate legal remedy . . . . . Litigants acquiesence does not amount to waiver of objection that Equity has no jurisdiction when bill shows on its face, lack of jurisdictional averments.

In Touey v. New York L. Ins. Co., 102 F. (2) 16, C. D., the Circuit Court of Appeals held: Where a cause of action cognizable at Law is entertained in Equity on ground of some equitable relief sought, which it develops cannot be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.

CONFLICT NO. 3

The opinion in the instant case ignores petitioner's contention that in the first action, insured was entitled to a jury trial on Issues of Fact in the State Court, and therefore he could not be denied a jury trial in the Federal court after removal by defendant, and if jury trial is denied, the Findings of Fact and Decree by a Chan-

cellor are void, which contention is supported by the following authorities:

Thompson v. Central Ohio R. R. Co., 73 U.S. 134, 18 L. Ed. 763

Benedict v. Williams, 10 F. 208
28 U. S. C.A. 81, Note 54, 55 and 57

Sec. 191, Colorado Code of Civil Procedure provides: Issues of Fact in all actions for breach of contract, or for money due on contract, must be tried by jury unless jury trial is waived.

CONFLICT NO. 4

The opinion in the instant case holds: That insured elected his remedy in Equity in the first action and failed, and cannot now pursue his alternative remedy at Law, notwithstanding, defendant did not plead "election of remedy" as a bar to this action. The above quotation is in direct conflict with the following opinions which hold that Circuit Courts of Appeal cannot be an advocate for defendant by interposing a defense not pleaded by defendant:

Henderson Tire & R. Co. v. Gregory, 16 F. (2) 589, 49 A.L.R. 1503

Hertz v. Mills, 10 F. supp. 979, affirmed 82 F. (2) 1010
18 Am. Jur. p. 168, sec. 53

The Complaint in the first action which begins on page 29 of this record and is marked defendant's exhibit A, alleges a breach of contract to pay disability benefits periodically, and a repudiation of the entire contract on the ground that insured disability did not occur while the policy was in full force and effect, and the prayer of the said complaint reads as follows:

"WHEREFORE, plaintiff demands judgment:

(a) That defendant be compelled to reinstate said policy as of December 10, 1928;

(b) That premiums due December 10, 1928, and all subsequent premiums, be waived by defendant;

(c) That defendant pay plaintiff $100.00 per month since October 1, 1928, with the legal rate of interest added on all delinquent payments, and that said payments of $100.00 per month be continued as long as plaintiff is totally and permanently disabled;

(d) And for reasonable damages suffered by plaintiff because of defendant's failure to perform its part of the said contract, and for his costs in this action, and for such other and further relief as to this honorable court may seem just and proper."

It will be observed that the main cause of action in the first Complaint is for money due on contract, and secondly, that defendant be compelled to pay plaintiff $100.00 per month as long as he is totally disabled, which doctors say will be until plaintiff's death.

It will also be observed that plaintiff did not institute proceedings to have policy declared in force, but for money due on contract and specific performance of contract over a period of years or until death.

Rule 86 of the New Rules of Federal Procedure provides that the effective date of the New Rules of Federal Procedure will be September 16, 1938, and it will be observed from the record herein, that the trial of the first action was July 25 and 26, 1938.

Rule 38 of the New Rules of Federal Procedure provide that the failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5d, constitutes a waiver by him of trial by jury.

Prior to the effective date of the New Rules of Civil Procedure, 28 U. S. C.A. 770 and 773, was the law regarding trials by jury, which statutes read as follows:

> "The trial of Issues of Facts in all District Courts in all cases except Equity and in cases of Admiralty and Maritime Jurisdiction, except as otherwise provided in proceedings in bankruptcy, shall be by jury.
>
> "Issue of Fact in Civil cases in any district court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk, a stipulation in writing, or by oral stipulation entered in the record of the court waiving a jury."

It will be observed that there is no waiver of a trial by jury in the first action, which trial was about six or seven weeks prior to the effective date of the New Rules of Civil Procedure. And there is also an affidavit in the record of the Circuit Court of Appeals which states that insured demanded a trial by jury and that said demand was denied on the ground that the first action was a suit in equity.

## CONCLUSION

Removing an action alleging breach of contract and demanding judgment for all money due on contract, from a State Court where there is a right to a trial by jury, to a Federal Court by defendant, and having Is-

sues of Fact determined by a Chancellor without a jury, where trial by jury has not been waived, invokes the jurisdiction of this court, pursuant to Rule 38, Paragraph 5.

WHEREFORE, petitioners pray that this action be reviewed on Writ of Certiorari and that the case be remanded to the trial court for a trial by jury on Issues of Fact.

This petition is presented because petitioners conscientiously believe they have been denied a righteous judgment based on Findings of Facts by a jury, contrary to Fundamental law and the public interest.

Respectfully submitted,

EDMOND L. VILES, Pro se

FRANCES N. VILES, Pro se

Petitioners.